

## REMARKS

Claims 11-15 are pending in the present application.

Claim 12 has been amended to remove process b).

Claims 11-15 have been rejected under 35 U.S.C. § 103(a) as being obvious in light of Shimotori (US 5,240,951). Applicants respectfully traverse.

It is clear that the compound of the instant invention falls within the disclosure of Shimotori. But it is not enough that the compound of the present invention is "structurally similar" to the fungicides of Shimotori. To establish a prima facie case of obviousness, there must be a positive teaching in the art that provides a reasonable expectation of success for the skilled artisan to pick the compound of the present invention and try it as a fungicide. In other words, the art must positively suggest the desirability of the modification. *In re Gordon*, 733 F.2d 900 (Fed. Cir. 1984).

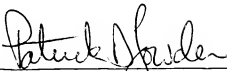
In the present application, there is no positive teaching to modify Shimotori to arrive at the compound of Claim 15 or Claim 11. While Compound 41 of Shimotori does teach substitution on the benzyl position (between the nitrogen and the 4-chlorosubstituted phenyl ring), the 3 and 4 positions of the isothiazole moiety are substituted with methyl and hydrogen, respectively. Furthermore, Compound 50 teaches merely a branched alkyl group off the nitrogen atom while maintaining methyl and hydrogen in the 3 and 4 positions of the isothiazole ring. The only teaching of Shimotori relevant to the instant claims is that Compound 36 teaches no benzyl substitution with the 3 and 4 positions of the isothiazole ring substituted by chloro. Therefore, the only apparent motivation derived from Shimotori is to place two methyl group on the benzyl position (and not in the instant claims) with concomitant substitution of the 3 and 4 positions of the isothiazole moiety by methyl and hydrogen. The present application only claims chloro at the 3 and 4 positions with mono-methyl substitution at the benzyl position.

Nonetheless, in order to further prosecution Applicants provide the declaration of Dr. Peter Dahmen wherein the compound of Claim 15 and Claim 11 is compared to Compound No. 36 of Shimotori. The results provided in Table 1 show that the use

of the compound of Claim 15 provides nearly double the activity of Compound 36 of Shimotori in a protective test for prevention of infestation by *Erysiphe graminis* f. sp. hordei.

In light of the above, applicants respectfully request a notice of allowance.

Respectfully submitted,

By 

Patrick D. Lowder  
Agent for Applicants  
Registration No. 47,757

Bayer CropScience LP  
100 Bayer Road  
Pittsburgh, Pennsylvania 15205-9741  
(919) 549-2587  
FACSIMILE PHONE NUMBER:  
(412) 777-3902